

JOINDER AND SEVERANCE — Rule 13.3(a), Ariz. R. Crim. P. — Joinder of offenses in charging because of their "same or similar character" — Revised 11/2009

Rule 13.3(a), Ariz. R. Crim. P., governs joinder of offenses in charging. That rule provides that two or more offenses may be joined in an indictment, information, or complaint if the offenses:

- (1) Are of the same or similar character; or
- (2) Are based on the same conduct or are otherwise connected together in their commission; or
- (3) Are alleged to have been a part of a common scheme or plan.

If offenses are joined only because they are "of the same or similar character" under Rule 13.3(a)(1), the defendant has an unconditional right under Rule 13.4(b), Ariz. R. Crim. P.,⁽¹⁾ to sever those cases for separate trials. *State v. Sustaita*, 119 Ariz. 583, 588, 583 P.2d 239, 244 (1978). "Thus, if offenses are joined only because they are 'of the same or similar character,' the defendant may always sever them." *State v. Ives*, 187 Ariz. 102, 106, 927 P.2d 762, 766 (1996). But even if the trial court denies a defendant's motion for severance as of right, that denial does not always require reversal. If the evidence concerning one offense would have been admissible for a permissible purpose under Rule 404(b), Ariz. R. Evid., there is no reversible error.

[E]ven if defendant is entitled to severance as a matter of right, the denial of severance is reversible error only if the evidence of other crimes would not have been admitted at trial for an evidentiary purpose anyway. [Citations omitted.] Thus, analysis of Rule 13.3(a)(1) is related in part to Rule 404(b), Ariz. R. Evid.; if a defendant's motion to sever is denied and joinder was based only on the similarity between the offenses, defendant only has a remedy if the prior act evidence would not have been admissible under Rule 404(b).

Id.

1. Rule 13.4(b), Ariz. R. Crim. P., provides:

As of Right. The defendant shall be entitled as of right to sever offenses joined only by virtue of Rule 13.3(a)(1), unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately.